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No. 79-530

In the Supreme Court of the United States

OCTOBER TERM, 1979

TEXAS OIL & GAS CORP., ET AL., PETITIONERS

v.

MICHIGAN WISCONSIN PIPE LINE COMPANY AND
THE FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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Petitioners contend that the court of appeals improperly deferred to the Federal Energy Regulatory Commission on the question whether petitioners' natural gas is dedicated to interstate commerce.

1. Almost 20 years ago, the Federal Power Commission issued certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c),[1] to Shell Oil Company, authorizing sale of

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[1]Section 7(c) provides in pertinent part:

> No natural-gas company * * * shall engage in the * * * sale of natural gas [in interstate commerce] unless there is in force * * * a certificate of public convenience and necessity issued by the Commission * * *.

natural gas in interstate commerce from certain wells. Production from those wells ceased in 1969 and Shell's interest terminated. No party applied to the Commission for an abandonment of the service rendered under the certificate. Years later, Texas Oil and Gas Corporation ("TXO") acquired a lease-hold interest in the acreage covered by the Shell certificate, began production anew and sold the gas in intrastate commerce. TXO sued in the District Court to quiet its title to the gas. The District Court granted relief, and in July 1979, the Court of Appeals reversed, deferring instead to the Commission's primary jurisdiction.

2. Petitioners contend that the court below erroneously failed to take account of the passage, in November 1978, of the Natural Gas Policy Act of 1978 ("NGPA"), Pub. L. No. 95-621, 92 Stat. 3350. The NGPA withdraws from the Commission's jurisdiction under the Natural Gas Act certain gas which otherwise could be required to be sold in interstate commerce. Petitioners admit they did not raise the issue in the court below, even on rehearing. Pet. 6 n.3. In these circumstances, this Court should not now consider this argument, which is raised for the first time in the petition for certiorari. *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); see *United Stars v. Ortiz*, 422 U.S. 891, 898 (1975); cf. *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). Petitioners' argument (Pet. 7-14) that Section 2(18)(B)(iii) of the NGPA, 92 Stat. 3354, releases their gas from a previous dedication to interstate commerce can be raised in proceedings before the Commission, which is charged with the administration of the NGPA, Section 501(a), 92 Stat. 3396.

3. Petitioners also contend that Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b),[2] did not require them to seek abandonment of the Shell certificate and they attempt to distinguish this Court's holdings in *California* v. *Southland Royalty Co.*, 435 U.S. 940 (1978) and *United Gas Pipe Line Co.* v. *McCombs*, No. 78-17 (June 18, 1979). Petitioners fail to recognize that under those precedents, a certificate obligation to provide gas to interstate commerce survives lapse of the interest of the original certificate holder, *Southland*, *supra*, and includes all production in the areas covered by the certificate. *McCombs*, *supra*. These decisions clearly establish that only the Commisison may authorize an abandonment of certificated service.

> Congress could not have been more explicit in establishing Commission approval as a prerequisite for lawful abandonment of service within its jurisdiction * * *. The language of §7(b) [15 U.S.C. §717f(b)] simply does not admit of any exception to the statutory procedure. This plain meaning has been acknowledged in several of our previous decisions.

United Gas Pipe Line Co. v. *McCombs*, *supra*, slip op. 6-7. Thus, the court below correctly ruled that petitioners were required to seek release of the pre-existing certificate obligation from the Commission.[3]

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[2]Section 7(b) provides:

> No natural-gas company shall abandon * * * any [certificated] service * * * without the permission and approval of the Commission.

[3]If petitioners believe that Shell Oil Company is a necessary party to proceedings before the Commission (see Pet. 17-18), they may move the Commission to make Shell a party to such proceedings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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